IN THE

Supreme Court of the United States

October Term, 1961

No. 31

GWENDOLYN HOYT,
Appellant,

v.

THE STATE OF FLORIDA,
Appellee.

BRIEF OF THE FLORIDA CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

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The American Civil Liberties Union and the Florida Civil Liberties Union, appear herein as *Amici Curiae* upon consent of the parties hereto, filed with the Clerk of the Court.

Interest of *Amici*

The American Civil Liberties Union is a nationwide non-profit, non-partisan membership organization devoted exclusively to the defense, the fostering, and the promotion of the rights guaranteed by the Constitution of the United States and of the various states. The Florida Civil Liberties Union is a state affiliate of the American Civil Liberties Union.

Amici appear herein because they believe that there has been a fundamental denial of appellant's rights under the Constitution of the United States in that she was denied her equal right to a fair trial because of discrimination against women in the establishment of jury panels in

Florida. This case is of vital importance to the appellant. In addition, it is of nationwide importance because similar discrimination exists in 22 states and the District of Columbia.

Statement of Facts of the Case

The facts of this case are given in detail elsewhere in the briefs and record on appeal. Suffice it to say that the defendant is a young woman convicted of the murder in hot blood of her admittedly faithless husband on the night he told her he was leaving her forever. The weapon used was not the handy kitchen knife usual in such killings of erring husbands [1] but a broken baseball bat belonging to her small son and equally ready to her hand. This is the classic form of marital tragedy, known from antiquity.

The defendant was tried before a jury, also a classic institution in English-speaking countries, a jury, as the saying goes, "of her peers." The jury were all men, the time 1957.

The Issue

The defendant claims that, because of the effectual exclusion (both by statute and administrative act) of women from the jury, the jury therefore was not a true cross-section of her peers and she was in consequence deprived of the equal protection of the laws guaranteed to her by the Fourteenth Amendment to the Constitution. Her defense rests on three separate points, each relevant to the central issue and each fully set forth in the principal brief. They will consequently be discussed here only briefly. This brief will be largely limited to the basic constitutional question as to what equal protection of the laws means or should mean to women in such a case in this present day and age.

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[1] Henrietta Additon, former Superintendent of the Women's State Prison, Bedford, New York, states that a great many women murderesses kill their husbands in hot blood with a kitchen knife.

THE THREE MAIN QUESTIONS

I

Whether that portion of Section 40.01(1), Florida Statutes, which excludes from jury service all female persons who do not volunteer to serve is repugnant to and in violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States?

The Florida Statute recites that "jurors shall be taken from * * * male and female persons" having certain identical qualifications, namely that they must be over 21 years of age, citizens of the State, and so forth. Then it goes on to say "provided, however, that the name of no female person shall be taken for jury service unless said person has registered * * * her desire to be placed on the jury list." Thus only women who have volunteered to serve, and in a particular manner in advance, can be called.

This is a differentiation as between men and women, a separate classification of the two groups, which, it is submitted, if challenged, can only be justified if the basis for such classification be reasonable. The challenge could come from either one of two sources, for there would appear to be at least two distinct rights involved: (1) the right and corollary obligation of fully enfranchised women, citizens in the exact sense of the word, to participate in this important public duty without special restrictions not imposed upon men, and (2) the right of all persons accused of crime to be tried before a jury which is a true cross-section of their peers.

The question of the reasonableness of this classification as between men and women jurors—the one compelled to serve, the other merely volunteering—therefore becomes

important. The reason generally given for the classification, and its supposed justification, is the hardship which might be imposed upon the mothers of small children if jury service were compulsory for them, or, as phrased by Judge Hobson (in his second dissenting opinion in this case, on the Petition for Rehearing, Supreme Court of Florida, January Term, filed April 20th, 1960), the fact "that women are primarily homemakers and should not be diverted from their duties as such."

If this classification be found unreasonable, then, it is submitted, the statute must fall as an unreasonable discrimination against both the potential woman juror and the woman defendant seeking a jury of her peers.

II

Whether said Section 40.01 (1) Florida Statutes, because of its effect in largely and systematically excluding women from the jury which tried the appellant, a woman accused of a crime under the circumstances and raising issues in which the point of view of women was most important, is, as applied to the appellant, repugnant to and a violation of the Fourteenth Amendment to the Constitution of the United States?

The figures, briefly stated, show that while the registered voters of the county in which defendant was tried in 1957 were 114,247 in number, of which 40% (46,000) were women, only 218 women were registered, 30 to 35 of them having done so in the last five years. Of this number, only 10 were picked for jury rolls in 1957, as compared with 9,990 men. This means that of the total chosen as available for jury service, only one-tenth of one percent were women. Even had all women who registered been included the figure would only have been a little over 2%. The great reservoir of registered women voters in the county was going virtually untapped.

This is in line with general experience. Whatever the causes, it appears to be a well established fact that, under a volunteer set-up, even without the necessity of advance registration as here, few women ever volunteer to serve.[2] Many women remain ignorant of the right and fail to exercise it on that account. Others find the nuisance of registration irksome. It also gives a splendid opportunity for some women who could easily serve to evade what to most people, men and women alike, is at best a disagreeable duty. Those women who do volunteer are mainly the dedicated women (or their descendants) who battled long and faithfully during the last century and this for the full emancipation of women and who finally won the vote forty-one years ago. Or else they are the least desirable among the members of the general public, those whom Judge Hobson (in his second dissenting opinion in the case referred to, *supra*) described as, "professional jurors—individuals who might be interested in the outcome of a given case or who, with nothing else to do, would have their attention directed toward the few dollars which are provided by law for such service."

Aside from the language of the statute itself, therefore, the administration of the Florida statute in recent years amply demonstrates that its effect is to keep women off the jury rolls for all practical purposes and thus to deprive defendant, a woman herself and accused of a crime peculiarly within the experience and understanding of women, of the opportunity to have women serve on her jury.

If this be the inevitable effect of a law based upon such a classification, the reasonableness of such classification becomes again the major issue.

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[2] Women Jurors, Julia Margaret Hicks, National League of Women Voters, p. 16 (1928). This indicates that the experience of Florida is typical.

III

Whether said Section 40.01(1), Florida Statutes, as applied by the jury commissioners, or whether the action of the commissioners, in arbitrarily limiting over a period of years the number of women placed on the jury list from which appellant's jury was drawn, is repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States?

In administering the Florida statute the Commissioners and their staff went beyond the limits of the statute and for no observable good reason took it upon themselves to circumscribe the potential of available women jurors even further than the law required. As stated above, it was their practice not to put down all the names of women who had registered, insignificant though that number was in relation to the total number of available men. In 1957 they did not even bother to look at the women's registry book and did not put down a single one of the new names. Discovering that there were 10 women's names still left undrawn from the previous year's list, they simply left them there; and those were the women, and the only women, available to be drawn upon for service on defendant's jury. The same number had appeared on the lists for several years previously.

Thus the act of the Commissioners and their staff was deliberate and intended to cut down the proportionate representation of women even lower than the insignificant number who had actually volunteered, the number being cut down almost to the vanishing point. It would appear to be a planned, systematic and arbitrary exclusion of women for all practical purposes from the lists.

It has long been the law that the express exclusion of Negroes from juries or jury lists, on the sole ground of race or color—whether by statute or administrative act—

was an unreasonable classification and therefore a denial to Negro defendants of the equal protection of the laws.[3] Is the same thing true in the case of women? Or is the rationale back of their classification in a category different from men, on the sole ground of sex, reasonable?

In a dictum written over eighty years ago, when only a few women had the right to vote and none had the right to serve on juries, the Supreme Court answered the second question in the affirmative.[4] Is it still a reasonable classification today? That is the question.

THE LAW OF THE CASE

The Right to Trial by Jury

Trial by jury is an ancient right; deriving, as every school child knows, from Magna Carta. In that document King John promised his people that henceforth they would be tried only by their peers.

This right is incorporated in the Constitution of the United States.[5] It is described there as the right "to an impartial jury." It appears in substantially the same form in most State Constitutions, including the Constitution of Florida.[6]

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[3] *Strauder* v. *West Virginia*, 100 U. S. 303, 1879; see also *Neal* v. *Delaware*, 103 U. S. 370.

[4] *Strauder* v. *West Virginia*, *supra*:

> "We do not say that within the limits from which it is not excluded by the amendment, a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the situation to *males*, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color." (Emphasis supplied.)

[5] Amendments V and VI.

[6] Section 11, Declaration of Rights; Florida Constitution.

As Blackstone phrased it several centuries after Magna Carta, "The right of trial by j.. or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter."[7]

In *Strauder* v. *West Virginia, supra,* the Court described a jury thus:

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

A jury has also been characterized repeatedly as "A cross-section of the community."[8]

For many years juries were limited to free men. No slaves or women were included. As Blackstone said, a common-law jury consisted of twelve "free and lawful men." Women were excluded "propter defectum sexus" (because of the defect of sex).[9] But changes were to come in both categories.

Negroes Achieved the Right of Trial by Jury by way of the Fourteenth Amendment

When the slaves were freed, the males among them automatically became citizens (in legal theory at least) with all the legal rights and responsibilities of citizenship, the right to vote and to hold public office and the right and obligation to serve on juries.[10]

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[7] Black, Com., as quoted in *Strauder* v. *West Virginia, supra.*

[8] *Glasser* v. *U. S.*, 315 U. S. 60 (1942).

[9] 3 Black. Com. 361.

[10] See *Strauder* v. *West Virginia* and *Neal* v. *Delaware, supra.*

The right of jury trial was not achieved however without a struggle. In *Strauder* v. *West Virginia, supra,* the Federal court permitted removal of a case involving a Negro, convicted of murder in a State court which excluded Negroes from the jury, to the Federal court, saying that the equality clause of the Fourteenth Amendment assured him protection from discrimination of that nature:

> "How can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?"

The court went further and indicated that in its judgement the Amendment was not limited to Negroes, saying:

> "Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment?"

In *Smith* v. *Texas,* 311 U. S. 128 (1940), a Negro had been indicted for rape by a Grand Jury of white men only. The law did not exclude Negroes and a few were occasionally chosen for service but, by various ingenious devices, none of them ever served. The Court (by Mr. Justice Black) said, "If there has been discrimination, whether accomplished ingeniously or not, the conviction cannot stand."

In *Cassell* v. *Texas,* 339 U. S. 282 (1949), a Negro indicted for murder claimed that Negroes had been intentionally excluded from Grand Jury panels, although a few had occasionally served but not in nearly the same proportion to the population as whites. It was also brought out in explanation of their exclusion that the Commissioners did not know any Negroes personally. The Court, while

remarking that "proportional representation of races on a jury is not a constitutional requisite," nevertheless ruled that intentional exclusion, although not absolute, had been proven and was sufficiently extensive to be in violation of the Fourteenth Amendment.

Other Groupings or Classes, Economic as well as Racial, have Achieved the same Right

A recent case [11] is significant because it has gone further in its application of the doctrine than any other so far. The case involved not race at all but economic status. While it was a Federal case from the outset and did not originate in any State, it nevertheless dealt with exactly the same kind of arbitrary exclusion that we are discussing here. The plaintiff, claiming injury caused by the negligence of a train crew which had known of his mentally unbalanced condition, protested that all daily wage earners had been "deliberately and intentionally excluded from the jury lists." The court found this to be the fact, saying that,

> "Business men and their wives constitute at least 50% of the jury lists • • • The exclusion of all those who earn a daily wage cannot be justified."

The court commented that what was needed was "an impartial jury, drawn from a cross-section of the community." While they cannot be "representatives of all the economic, social, religious, racial, political, and geographic groups of the community; frequently such complete representation would be impossible," nevertheless, "Prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups."

It concluded by saying that, "Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked."

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[11] *Thiel* v. *Southern Pacific*, 328 U. S. 217 (1946).

Mr. Justice Frankfurter (dissenting from the finding of exclusion), added his comment on the jury system thus:

> "The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

A later case, *Hernandez* v. *Texas*, 347 U. S. 475 (1954), involving a Mexican, a man of different race but not a Negro, is significant for the summary made by the Chief Justice of the nature of such cases generally. Hernandez had been tried for murder before a State jury from which all Mexicans had been deliberately excluded by administrative act. Chief Justice Warren delivered the opinion:

> "It is a denial of the equal protection of the laws," he said, "to try a defendant of a particular race or color under an indictment issued by a Grand Jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers.
>
> "His only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent."

He then summed up the general rule in language going far beyond the limited realms of race or color, as follows:

> "*When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.*" (Emphasis supplied.)

What of the Rights of Women under the Amendment?

It is a violation of the equal protection guaranteed by the Fourteenth Amendment for a Negro to be tried before a jury from which members of his race or color are systematically excluded, in whole or in substantial part. It is equally a violation for members of other races or color, and even for members of sharply differing economic categories.

What then of women who, if they are excluded, as Mr. Justice Douglas said in *Ballard* v. *United States*, 329 U. S. 187 (1946), would leave "only half of the available population" to be "drawn upon for jury service?" What is the reason compelling enough to justify their absence from this important "phase of civic responsibility" and "diffused impartiality?"[12] How can we have a true cross section of the community to draw upon without women? Where is that equality of protection guaranteed by our Constitution if a woman defendant accused of a dreadful sex murder must be judged only by men?

These questions have been answered, as we have seen, and almost always against women, in the past. But the past is past and we are dealing with the present. As was said in *Brown* v. *Board of Education*, 347 U. S. 483, "We cannot turn the clock back to 1868 when the Amendment was adopted * * *. We must consider public education in the light of its full development and its present place in American life throughout the nation."

The same reasoning surely applies to women who too have had to fight a slow and painful battle during the last century and a half for recognition and status not very different from that of the Negro slaves.

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[12] Justice Frankfurter in *Thiel* v. *Southern Pacific*, *supra*.

History of Women Jury Laws

It may help us to understand the problem better if we briefly review the history of the jury laws relating to women. Women are newcomers in this field, the first woman juror having served in Washington State in 1911. It is easy to understand why they were not thought of for such service in King John's day. Women who were married, as most adult women were, had no legal status in those days. Their legal existence was deemed "suspended" during marriage, which meant swallowed up in that of their husbands. No wonder that, when people talked of juries of one's peers, they referred to men and not women. The defect of sex was for women an almost total blackout.

But that was long ago. Women have gone through a revolution since those days. Nevertheless when Negro men slaves won their freedom in the United States they automatically gained all the rights that went with citizenship,[13] whereas, when women won the vote after fifty years of struggle, the vote was all they got. The Nineteenth Amendment covered only that one point. They were still not full citizens as Negro men were. The defect of sex still hung heavy upon them and they had to fight separately for all the other rights that go with citizenship. Further state legislation was required to give them the right to hold public office; further state legislation was required to give them the right and the duty to serve on juries. Even now, forty-one years after they finally won the full right to vote, the right of jury service is still withheld from women altogether in three States and it is granted on a voluntary basis only in nineteen others and the District of Columbia. Only twenty-eight states grant jury service to them on

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[13] *Strauder* v. *West Virginia*, *Neal* v. *Delaware*, *supra*.

the same terms as men, of which seven permit women with family responsibilities to be excused.[14]

The dictum of *Strauder* v. *West Virginia*, *supra*,[15] has been responsible for all this confusion and delay. For, as

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[14] Memorandum of U. S. Department of Labor, Women's Bureau, Washington 25, dated August 7, 1961.

"*Summary of Jury Service Provisions for Women in State laws*

"State laws governing women's eligibility for service on State juries remained static in the last two years with the exception of Maryland, where the two remaining counties removed the bar to women's eligibility. Alabama, Mississippi, and South Carolina still do not permit women to serve on State juries although they can and do serve on Federal juries in those States by virtue of the Civil Rights Act of 1957.

"Twenty-eight [1] States provide that women are subject to jury service on the same terms and conditions as men. Of these so-called 'compulsory' laws, 7 [2] permit women to be excused if they have family responsibility which would make jury service an undue hardship. Sixteen [3] States and the District of Columbia permit a woman to claim an exemption solely on the basis of her sex. Florida, Louisiana, and New Hampshire require a woman to indicate her desire to service before she is eligible. The constitutionality of the Florida provision is being tested in the United States Supreme Court where hearings have been scheduled for the October term."

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[1] Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, West Virginia, Wyoming.

[2] Connecticut, Nebraska, North Carolina, Oklahoma, Texas, Utah, Wyoming

[3] Alaska, Arkansas, Georgia, Idaho, Kansas, Massachusetts, Minnesota, Missouri, Nevada, New York, North Dakota, Rhode Island, Tennessee, Virginia, Washington, Wisconsin."

[15] Namely, that the question of jury qualifications for women was a matter for the States and that the Fourteenth Amendment was never intended to prohibit it.

a result of that dictum, the determination of the sex qualifications of jurors has been left entirely to the States. The federal government has been concerned only with juries in the federal courts and their rules followed those of the States in which each federal court was located. Each state has had its own jury statute dating back to Revolutionary days and there has been wide diversity in the qualifications and the language used to describe them. Many states used the term "male" or the masculine pronoun in describing jurors; others used the words "electors", "voters", "freeholders", and the like. As each state granted women the franchise or other civil rights (many of them prior to 1920), there ensued an enormous amount of litigation as to the meaning and effect of these new statutes upon the old and as to how the old should be interpreted or modified by them if at all.

If the word "voter" or "elector," for instance, had been used in describing jurors in the old law, the question had to be decided whether the fact that women had become voters automatically made them jurors now. In Massachusetts the answer was, "No."[16] In several other states the answer was, "Yes".[17] It is interesting to note that in some of these latter cases there was favorable reference to the doctrine enunciated in *Neal* v. *Delaware, supra* (the case involving Negroes), as being analogous to the case of women, and some criticism of the opposing decisions of other states thereon.

If the word "male" had been used in the old jury statutes, however, women invariably lost out. In *In Re Grilli*, 179 N. Y. S. 795, for instance, a case typical of this line of cases, it was said that the use of the word "male"

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[16] *Re Opinion of the Justices*, 237 Mass. 591.

[17] *Commonwealth* v. *Maxwell*, 271 Pa. 378; *Parus* v. *District Court*, 42 Nevada 229; *People* v. *Baritz*, 212 Mich. 580, among others.

automatically excluded women as long as the word stood on the statute books. New legislation would have to be enacted in order to give women the right to serve.

Thus women have had to fight in every state to expand their rights in these areas and they are still fighting.

Few of these cases have reached this Court. The few that have were mostly brought by men complaining of discrimination under the Fourteenth Amendment, not because of the *absence* of women from juries but because of their *presence* on them. Several of them concerned violations of liquor laws where the trepidation of men at having women on their juries in prohibition days was perhaps understandable. Such cases were dismissed as without merit.[18]

One case which came before the Supreme Court in 1947 has been cited as supporting the dictum in *Strauder* v. *West Virginia, supra.* This case, *Fay* v. *New York*, 332 U. S. 261, however, on its facts would appear to do nothing of the sort. Plaintiff was a man, not a woman; a woman actually served on the jury before which he appeared; and the case was decided on the ground, among others, that there was no evidence of any systematic exclusion either of women, laborers, mechanics, or any other of the groups complained of as missing. Of this, so far as women were concerned, there could be no doubt. Of the 60,000 on the panel, 7,000 (or 11%) were women. Three women had been drawn as talesmen and one actually served on the jury in question. This could hardly be described as exclusion, systematic or otherwise. But it was not the central point of the case. The real point at issue was the special Blue Ribbon type of jury before which plaintiff appeared. Composed, by a special screening process of the better educated members of the community, plaintiff

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[18] See *Tynan* v. *U. S.*, 297 F. 177; Cert. Denied, 266 U. S. 604 (1924).

complained of it as more prone to convict than a regular jury. The due process and equality clauses of the Fourteenth Amendment were both discussed and declared inapplicable on the facts. The case would appear to be in no way parallel to the case at bar.

As for the old dictum of the *Strauder* case, *supra*, it would seem that this, written in the aftermath of the Civil War and while the immediate occasion of the Fourteenth Amendment (namely, the freeing of the slaves) was still fresh in all men's minds, should be deemed to have been superseded by the later decisions giving wider scope to the Amendment and particularly by the summary in Chief Justice Warren's opinion in 1954 in the *Hernandez* case, *supra*, as to the criteria applicable to the equality clause of the Fourteenth Amendment.

In respect to jury service, the Fourteenth Amendment would now appear to extend equal protection to all demonstrably distinct classes of society. The Amendment was never by its language limited to Negroes only, or even only to race or color. Whenever a demonstrably distinct class of society is classified in a way different from other classes, the classification must be reasonable. If not, inequality results and the classification must fall.

Since women are a demonstrably distinct class in the community, this rule would appear to be equally applicable to them. In order to determine the reasonableness of their differential treatment in this field, let us take a look at the various qualifications imposed by the states on jurors generally and their reasons for being.

The Qualifications of Jurors, Differential and Otherwise

Within the constitutional limits imposed upon them, the states have set up a great variety of different qualifications for jury service. Some are the same for everybody, such as age, citizenship, literacy, etc. Others make differentiations as between different groupings of people.

While varying in details, most of the differentiations follow a general pattern of public policy, convenience, and good sense. All citizens are compelled to serve except for the various exceptions arising out of these differentiations. The exceptions under New York Law, which are numerous, are typical.

New York has various categories.[19] Some groups are wholly disqualified, government officials, legislators, judges and the like, who by the very nature of their tasks should not be called upon to serve. Convicted felons are another wholly disqualified group which it also seems reasonable to exclude. Another group consists of jurors with scruples against the death penalty "which would prevent him from finding a verdict of guilty of any crime punishable by death." The reason for this is perhaps more questionable but it has found wide acceptance among the States.[20]

Other groups have the right to claim exemption if they wish to. These are doctors, clergymen, teachers, lawyers, firemen or policemen, newspapermen and the like. All of these groups, while representing important segments of community life, are nevertheless engaged in occupations which in the public interest should not be too much interfered with, hence their right not to serve.

The third and final category might be called the temporary or emergency hardship cases. The prospective juror in this case if called must ask the judge to be excused

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[19] Judiciary Law of New York—Secs. 504-505-506-507.

[20] This category (common to most States) has come under heavy criticism lately on the ground that it tends to exclude more and more of the perceptive and thoughtful people in the community and that the question of the nature of the punishment is quite different from the question of guilt. See *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, by Walter E. Oberer, May, 1961, Texas Law Review.

on the ground of hardship of one sort or another. The judge is given wide discretionary power to excuse for a great variety of reasons.

All of this, except perhaps for the disqualification of those with scruples against the death penalty, seems fair and reasonable. After all, jury service while compulsory was never intended to impose undue hardship on anybody nor to take people important to the community in other capacities (such as doctors and teachers) away from their regular responsibilities. The pool of persons available in the general community is sufficiently large not to require any such sacrifice. So, on balance, in most of these cases, the reason for separate classification and exemption in respect to jury duty seems a good one.

New York, however (like eighteen other States, including Florida), includes another grouping in its exempt category—women. There is no limitation upon the generality of this exemption. All women are free to claim their exemption qua women. In other words jury service with them is not compulsory, it is wholly voluntary. In Florida they must register as well.

What are the reasons for this?

Reasons for the Differential Classification of Women

Part of the reason for it of course is historical, a survival of the thinking of older times, when women were no part of the body politic. Old habits change slowly; customs survive far beyond the reason for their being; the herd instinct is strong. Particularly has this been true in the case of women whose advance, predicated on logic, has been retarded principally by emotion.

"Woman's place is in the home," a slogan of ancient origin, has living force and terrific emotional impact even today. It has taken people a long time to realize (and some

still do not) that the great revolutionary forces that helped to bring about the advancement and emancipation of women in the last century have changed the patterns of living for women to an astonishing extent and have in effect forced many women to find a new place for themselves in the world outside their homes.

But, aside from the inevitable emotional lag, it is quite true that women have always been primarily identified with the home and with the care and feeding of infants and that many of them still are. In applying these facts to the problems of jury service for women, therefore, their exemption from such service has been variously justified as (1) an effort to save women with small children at home from the hardships of jury service, (2) as expressed by Judge Hobson in his dissenting opinion in the case at bar (in which he expressed strong disapproval of the exemption), as an effort "to prevent women from being diverted from their primary duties as homemakers," or (3) as expressed in the majority opinion in the same case, as a means of preventing jury service from placing "an unwarranted strain upon the social and domestic structure," in view of woman's "role in society."

THE CLASSIFICATION OF WOMEN INTO A SEPARATE CATEGORY, FOR JURY SERVICE PURPOSES, IS UNREASONABLE

A Revolution has Taken Place in the Lives and Status of Women

It might be appropriate at this point to say a word about the emancipation of women, familiar as that revolution is to most of us, because it is the key to this case.

Blackstone's description of the status of married women under Common Law in England, whether wholly accurate or not,[21] is classic. He describes them as chattels, in

[21] See Mary R. Beard, *On Understanding Women*, p. 22, *et seq.*

effect slaves, their legal existence suspended during marriage, with limited freedom of movement, little right to property or earnings, no control over their children, and no political or civil rights of any kind. Blackstone's quip (slightly paraphrased) that "Husband and wife are one and that one is the husband" was no idle jest. At the very moment when a man met his bride at the altar and said to her, "With all my worldly goods I thee endow," he was actually taking every cent she possessed. Her children owed her no obedience, only "reverence". The head of the household really was. He could beat her with a stick "no bigger than the wedding ring." [22] All this on account of her "*defectum sexus.*"

Difficult as it is to believe, women still lingered under some of the most serious of the disabilities of that early *defectum sexus* when our Declaration of Independence and

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[22] *Black. Com.*, Gavit, pp. 189-190; 196.

See also Professor Trevelyan's *History of England*, pages marked "Women—position of." Reading these and marvelling at the contrast between the picture painted therein and the women of the period as portrayed in fiction, Virginia Wolfe was led to comment:

> "Indeed, if woman had no existence save in the fiction written by men, one would imagine her a person of the utmost importance; very various, heroic and mean; splendid and sordid; infinitely beautiful and hideous in the extreme; as great as a man, some think even greater. But this is woman in fiction. In fact, as Professor Trevelyan points out, she was locked up, beaten and flung about the room.
>
> "A very queer, composite being thus emerges. Imaginatively she is of the highest importance; practically she is completely insignificant. She pervades poetry from cover to cover; she is all but absent from history. She dominates the lives of kings and conquerors in fiction; in fact she was the slave of any boy whose parents forced a ring upon her finger. Some of the most inspired words, some of the most profound thoughts in literature fall from her lips; in real life she could hardly read, could scarcely spell and was the property of her husband." Virginia Wolfe, *A Room of One's Own*, pp. 74-75.

Constitution were penned. But the winds of change were blowing and Jefferson's heady prose, plus the three slogans of the French Revolution and the coming of the Industrial Revolution in the next century, which swept many of women's traditional occupations right out of their homes, and women along with them, all were to have their effect.[23]

By the first quarter of the last century the rights of both women and Negroes were being widely discussed. The catalyst for women, ironically enough, was an Anti-Slavery Convention held in London in 1840. Lucretia Mott and Elizabeth Cady Stanton attended, one as a delegate, the other as bride-wife of one. Women delegates to anything were unheard of in England at the time and the Convention almost fell apart in its indignation at the American women's effrontery. "It would be placing them on a footing of equality with us!," cried the passionate anti-slavery advocates—and promptly voted to throw the women out.

> "That night," writes Mrs. Stanton, "as Mrs. Mott and I walked away, arm in arm, we resolved to hold a convention as soon as we returned home, and form a society to advocate the rights of women." [24]

And so a Women's Rights Convention was held in Seneca Falls, New York, on July 16, 1848. It produced a

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[23] Ernest R. Groves, *The American Woman*, Chapters VIII, IX, X and XI, Woman's Political and Social Advance, Woman's Industrial and Educational Advance, The American Woman in the Twentieth Century, The American Woman and Her Changing Status.

[24] *Victory, How Women Won It*, National American Woman Suffrage Association, A Centennial Symposium, 1840-1940, pp. 16-21. It is a pleasure to record that William Lloyd Garrison of Boston, also a delegate but who arrived too late for this battle, was so indignant that he refused to offer his credentials or to take any part in the convention. He sat throughout the entire convention in the gallery with the women "looking down in grim and silent condemnation" on the scene.

document modelled after Jefferson's Declaration of Independence but with a difference. Entitled "Women's Declaration of Sentiments," it opened thus:

> "We hold these truths to be self evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; * * *.
>
> "The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world." [25]

Then came eighteen grievances, listed like Jefferson's, among them all the disabilities under which women had long been suffering, political, educational, economic, religious and social.

The woman's movement was launched. In magnificent prose (slightly borrowed), with little humor, but great intensity and dedication of purpose, the principles had been formulated and the issues joined. The best of American women's brains went into that bitter document. It is easy now to make fun of its quaintly exaggerated phrases. But none can gainsay the passion, the intensity of thought and feeling, that went into its making, the crusading zeal of those pioneering women ancestors of ours, their determination to destroy injustice and to restore elementary rights of human freedom, their consecration to their cause, their willingness to brave any and all indignities, to be mocked at, scorned and derided, all in pursuit of their great ideal of human liberty.

More than 100 years have passed. Most of those liberties are won. For one thing, and that perhaps most basic, women are educated. It is no longer true, as it was

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[25] *Victory, supra,* p. 27.

in Shakespeare's time, as Virginia Wolfe tell us,[26] that Shakespeare's sister could neither read nor write. We can. Women go to school, to college, even to graduate school, with the result that there is no bar, as there used to be, to their entry into practically all the professions. Partly on account of this, women's entry into economic life in all its phases and their opportunities there, both as wage-earner and as independent operator, have been greatly expanded. In our homes the relationship of husband and wife is increasingly that of a partnership of equals, with joint responsibility for the children. Women can hold property in their own right. They can pay taxes (there has never been any difficulty about that); but they can vote and legislate as well which assures that there is no taxation without representation. In fact women are now full-fledged emancipated citizens with most of the privileges and immunities and responsibilities appertaining thereto. Women are your peers, the peers of Supreme Court Justices, of Negroes, Mexicans, Jews, Catholics and even White Protestants. What disabilities remain are largely in the area of habit and custom, some of which can be helped by specific legislation (such as equal pay laws) but most of which can be cured only by education and the application of the great constitutional provisions of equality and fair play.

The Reasons Stated for Excluding Women from Jury Service are no longer Compelling or Valid

One of the remaining legal disabilities is this classification of women into a separate category for jury service, a category that seems to have outlived its time and purpose.

This consideration for the woman homemaker, that relatively small group of women of child-bearing age with small children to take care of at home, is admirable. But their numbers do not begin to include all women, the bulk

[26] Virginia Wolfe, *A Room of One's Own*, pp. 80-84.

of whom, who have no such special responsibilities, could be drawn upon just as men are now for this vital service. Furthermore, the hardship that jury service might subject them to could easily be prevented through the broad discretionary power of the judge to excuse in such cases. In fact it is unthinkable that a judge would not be eager to excuse mothers of children under such circumstances. To exempt all women in order to protect these few seems unrealistic and uncalled for.

In the U. S. today women comprise 33% of the total labor force, 36% of all women and girls over fourteen are members of the labor force, 55% of them are married and more than 30% of all married women work.[27] Fifty percent of all girls marry before they are 20. The average age of a woman when her last child enters school is 32.[28] Her normal life expectancy is 73.7 years (as compared with a life expectancy for men of 67.2).[28a] In other words only 11 years out of the average married woman's nearly 53 years of adult life (or 20%) are needed for or given over to baby-sitting. With a population steadily extending its life span, women already are more numerous than men by about three million and outliving them by six and one half years each, it is clear that our older citizens are becoming more numerous and more female all the time and the number of younger women with babies in the home less and less.

Judge Hobson, in his dissenting opinion in the case at bar, *supra*, put it well when he said:

> "No valid reason exists for limiting jury service to women who volunteer. Trial Judges have the same

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[27] U. S. Department of Labor, *Hand book on Women Workers*, for 1958, p. 2.

[28] *Women in the Sixties—Their Job World*, National Man Power Council, in conjunction with Bureau of Research, Studies and Program Resources, National Board of Young Women's Christian Association of the U. S. A., 1960.

[28a] For whites born in 1958; for non-whites, the expectancy is approximately seven years less in each category according to Public Health Service, as republished in the *World Almanac*, 1961, p. 464.

broad discretion to excuse women with pressing duties at home as to excuse men with pressing business commitments. Moreover, since the advent of woman suffrage and the entry, in this era of modernity, of untold numbers of American women into all fields of business and professional life, the reason given for excluding them from jury service no longer exists."

The Fact of their Exclusion works a Positive Injustice not only to them but to Persons other than Themselves

Not only are the reasons stated for the exemption of women no longer compelling or valid; there are other reasons for calling it unreasonable. Their exemption works a real hardship on the male juryman upon whom a greater burden of service is placed than would otherwise be the case. It deprives the conscientious woman citizen of the chance to feel that she too is performing her duty and makes it more difficult for her to do so. And lastly, it does great injustice to the female defendant (as in the case at bar) who so badly needs the diffused impartiality of a jury drawn from all segments of our society, emphatically including women.

There are thus really three rights affected by jury service. One is the right of men to have women share this onerous duty of citizenship with them. Another is the right of the fully emancipated, fully enfranchised woman citizen to exercise this important right and obligation of citizenship. It is a belittlement of her accomplishment in overcoming that long time sex defect of hers to suggest, even by implication, that even in this day and age she is perhaps still not qualified or capable of performing this simple act of good citizenship on the same terms as men. It is a genuine humiliation and degradation of her spirit. Not all women feel this way but some do and they constitute some of our most conscientious citizens. The third right is perhaps the most important. That is the right of

the woman accused of crime to have her case heard by a jury composed of the broadest possible cross section of the people making up her community, her neighbors and her peers, so that its impartiality may be insured by the wideness and diffusion of the interests it represents. In such a cross section can anyone doubt that women play an enormously important part?

For years men said that some cases were not "fit" for women to hear. They had in mind of course cases involving sex offenses. But nothing could have been more short-sighted or snobbish. For, as the *League of Women Voters* observed many years ago, "*such a trial concerns other persons more vitally than it does the jurors and one of these persons principally involved is always a woman or a girl. That fact in itself would seem to prove without further comment why there should be women on the jury no matter what may be the evidence that has to be produced to reach a verdict fair to the litigants and fair to the community.*" [29] (Emphasis supplied.)

In the case at bar the defendant is a woman and her crime is one of those dreadful marital tragedies which women have known about for centuries and in respect to which they certainly have every bit as great experience and capacity for understanding as men. Does it not shock our sense of fair play that, because a few young women with small babies at home might find it inconvenient to come to court to hear her case (and of course they would not have to because the Judge would excuse them), this woman should be deprived of even one single woman on her jury?

In *Ballard* v. *United States, supra*, Mr. Justice Douglas defined better than it has ever been defined before the special quality which women bring to jury service and which makes it so vital to have them serve. The case arose in the

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[29] *Women Jurors*, Julia Margaret Hicks, National League of Women Voters, pp. 15-16.

Federal District Court in California. A mother and son were the defendants. Compulsory woman jury service had recently been adopted in that State and the Federal court, required by law to follow the new State jury qualifications, had not yet done so. In his opinion, written in 1946, Justice Douglas went beyond the circumstances of the case to express the underlying philosophy upon which the whole concept of jury service for men and women rests. After remarking that "If women are excluded only half of the available population is drawn upon for jury service" he goes on to give the basic reason why they cannot be left out, at pp. 193-4:

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men, personality, background, economic status and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? *The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.*" (Emphasis supplied.)

Upon the strength of the *Ballard* case, the indictment of a woman for forgery was dismissed in 1947 in a New York case, *People* v. *Cosad*,[30] the court declaring that the absence of women on the Grand Jury was a violation of defendant's Constitutional rights. Women had been

[30] 189 Misc. 939, Seneca County, this being the County in which Seneca Falls, where the 1848 Women's Rights Convention was held, is located.

allowed by law to serve on New York juries, on a permissive basis, since 1938, but none had served on Grand Juries in Seneca County.

The Court said:

> "I find that persons of the female sex have been systematically excluded from service as grand jurors in Seneca County and particularly from the Grand Jury which indicted this defendant. Such systematic exclusion is a violation of this defendant's Constitutional rights." [31]

It is also interesting to note that in 1948 Arizona also found an optional woman jury law unconstitutional, *State* v. *Pelosi;* [32] and that in that State "women are now compelled to serve on juries if called, subject to statutory exemptions and excuses at the discretion of the presiding judge." [33]

Can anyone doubt that women defendants (and men too) need women as well as men on juries? Why wait until all the remaining twenty-two states and the District of Columbia have enacted laws conferring the obligation of jury service on women on the same terms as men? If we do we will be treating defendants in those states, who want to be judged by a true cross section of their peers, unequally and therefore unconstitutionally.

Congress appears to be of the same mind for it recently passed a law (in 1957) providing for women jury service in all Federal courts regardless of whether the State law of the district permitted it or not.[34] Apparently Congress

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[31] Quoting *Gerry* v. *Volger*, 252 App. Div. 217; *Peo.* v. *Shearer*, 169 Misc. 69; *Ballard* v. *U. S.*, 329 U. S. 187.

[32] Arizona Supreme Court, 99 Pac. (2nd) 125.

[33] *The Legal Status of Women in the U. S. A.*, U. S. Department of Labor, Revised 1956, p. 100.

[34] *1957 Civil Rights Act*, 28 U. S. C., Section 1861.

and the Federal courts are tired of waiting for backward states to act.

The Time to Act is now—the Florida Law should be Declared Unconstitutional and Jury Service Opened up to Women Everywhere on the same terms as Men

We cannot turn the clock back to 1878, much less to 1215. The "separate but equal" doctrine, disposed of in *Brown* v. *Board of Education, supra*, persisted far beyond its time, teaching and spreading injustice for Negroes all the way. Suddenly there came a fresh breeze across our national life and the evil clouds were swept away. It was the impact of World War II, the coming of the United Nations into our lives and our awakening to the world around us that brought this revolution in our thinking. Integration, we suddenly saw, was inevitable everywhere.

Just so with the advancement of women. The United Nations has brought a change into women's lives too. The words of the Charter, "Fundamental Freedoms for All without Distinction as to Race, Sex, Language, or Religion," are being translated into living deeds. The defect of sex is in process of being swept away on a world-wide scale at last. Only ten countries in the entire world now refuse voting rights to women, and in two of them the vote is refused to men as well.[35] Women are being brought out of their long-enforced segregation; the Moslem veil, the purdah of India, all are being abandoned; and women are beginning to mingle with men in the affairs of the world. The responsibilities of citizenship are being granted to them practically everywhere on the same terms as men. Should we in the United States be more backward than the rest of the world in integrating our women?

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[35] United Nations General Assembly *Report of Secretary General on Status of Women*; Constitutions, Electoral Laws, and other Legal Instruments Relating to Political Rights of Women, 1960.

I close with the words of Pearl Buck, long a close student of the world-wide movement of women towards human dignity and freedom:

> "Free men and free women, working on equal terms together in all the processes of life—and what is this but democracy? For in our preoccupation with nations and peoples and races, let us remember again that there is a division still more basic than these in human society. It is the division of humanity into men and women. Men and women against each other dstroy all other unity in life. But when they are for each other, when they work together, the fundamental harmony exists, the foundation upon which may be built all that they desire." [36]

CONCLUSION

For the foregoing reasons and for those advanced by the appellant, the provision of the Florida law requiring women to volunteer for jury service should be declared violative of the Constitution of the United States and Gwendolyn Hoyt's conviction of murder, therefore, should be reversed.

Respectfully submitted,

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[36] Of Men and Women, p. 202.